STATE OF MICHIGAN

COURT OF APPEALS

SALEM KASSAB and YAZDAN KASSAB,

Plaintiffs-Appellants,

v

SEAN DENNIS, Individually and d/b/a S & D LAWN SERVICE,

Defendants-Appellees.

UNPUBLISHED
March 24, 2009

No. 283394
Oakland Circuit Court
LC No. 2006-078443-CZ

Before: Cavanagh, P.J., and Fort Hood and Davis, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's grant of summary disposition in favor of defendants. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs Salem ("Sam") and Yazdan ("Yazdan") Kassab are a married couple who own a home. Defendant Dennis owns a lawn service business. Sam contracted with Dennis for the installation of a fountain on plaintiffs' property. Plaintiffs contend that Dennis was negligent in installing the fountain and caused damage to their septic system and basement. After the fountain was installed, Dennis and Sam entered into a written agreement in which Dennis promised to file a claim with his insurer for the purported damage in exchange for Sam's promise not to sue Dennis for any such damage. Dennis drafted the agreement, and Sam signed it. Dennis subsequently filed a claim with his insurer, which denied the claim. Plaintiffs then filed a complaint against Dennis for negligence. The trial court granted summary disposition to defendants on the ground that the release agreement barred all of plaintiffs' claims.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

Plaintiffs raise two issues on appeal. First, they argue that the agreement between Sam and Dennis is not a valid contract or release because it was not supported by consideration. The burden of proving failure of consideration is on the party asserting it. *Adell Broadcasting v Apex Media Sales*, 269 Mich App 6, 12; 708 NW2d 778 (2005). Here, the purported consideration is Dennis' promise to file a claim with his insurance company for alleged damage to plaintiffs' property caused by his installation of the fountain. Plaintiffs argue, however, that Dennis already

had a preexisting duty to report any possible claims to his insurance carrier. Under the preexisting duty rule, therefore, Dennis' promise is not consideration.

"Under the preexisting duty rule, it is well settled that doing what one is legally bound to do is not consideration for a new promise." *Yerkovich v AAA*, 461 Mich 732, 740-741; 610 NW2d 542 (2000). This rule applies whether the preexisting duty is statutory, *Alar v Mercy Mem Hosp*, 208 Mich App 518, 525; 529 NW2d 318 (1995), or contractual, *Yerkovich*, *supra* at 740-741, and whether the new promise at issue is a modification of an existing agreement, *id*., or a new and independent agreement, *46th Circuit Trial Court v Crawford Co*, 476 Mich 131, 158; 719 NW2d 553 (2006). Plaintiffs argue that Dennis' duty was contractual, based on the contract between Dennis and his insurer. However, they offer no evidence that Dennis' policy contains such a notice requirement. Even if it does, they cite no authority that would convert such a provision into a legal duty imposed on Dennis. Furthermore, plaintiffs do not argue that they are either direct or third-party beneficiaries of Dennis' insurance contract. An insurance contract is an agreement between the parties to the contract. *Zurich-American Ins Co v Amerisure Ins Co*, 215 Mich App 526, 530; 547 NW2d 52 (1996). Dennis' insurance policy is a contract between himself and his insurer; plaintiffs are not a party to this contract. Consequently, any contractual "duty" to provide notice of claims would be owed by Dennis to his insurer, not to plaintiffs.

Plaintiffs offer no other preexisting duty—contractual or statutory—requiring Dennis to file a claim with his insurer. Therefore, the preexisting duty rule does not apply. We affirm the trial court's finding that Dennis' promise to file a claim is consideration for the release.

The second argument raised by plaintiffs on appeal is that even if the agreement constitutes a valid contract or release, it applies only to Sam and not to Yazdan, who did not sign it. Plaintiffs base their argument on several sources of law. First, they cite the Michigan Construction Lien Act, which states: "Each contractor, subcontractor, supplier, or laborer who provides an improvement to real property has a construction lien upon the interest of the owner or lessee who contracted for the improvement to the real property. . . ." MCL 570.1107(1). A construction lien is an encumbrance on the title to the property, which encourages payment to resolve disputes regarding services performed on the property and acts as security for contractors who perform such services. *ER Zeiler Excavating, Inc v Valenti Trobec Chandler Inc*, 270 Mich App 639, 646; 717 NW2d 370 (2006). Here, Dennis has been paid in full for his work and is not seeking a lien.[1] The statute therefore does not apply.

Plaintiffs also cite real property case law to argue that when a contractor claims a lien on a residential structure on property owned by a married couple as tenants by the entirety, the contractor cannot rely on a contract to improve the property if only one spouse made the contract and the other spouse did not consent to the improvements. This case law is inapplicable for several reasons. First, Dennis is not seeking a lien on plaintiffs' property. Second, Dennis is not relying on a contract "to improve the property" (in this case, to install the fountain); he is relying

[1] Even if the Michigan Construction Lien Act did apply to this case, the statute specifically states that "if the real property is owned or leased by more than 1 person, there is a rebuttable presumption that an improvement to real property under a contract with an owner or lessee was consented to by any other co-owner or co-lessee." MCL 570.1107(5).

on a subsequent release. And third, there is no evidence that Yazdan did not consent to the installation of the fountain.

Finally, plaintiffs cite *Rogers v Rogers*, 136 Mich App 125, 134; 356 NW2d 288 (1984), which held that when real property is held by spouses as tenants by the entirety, "neither spouse acting alone can alienate or encumber to a third person an interest in the fee of lands so held." As the trial court correctly noted, however, the agreement between Sam and Dennis "did not transfer, convey or encumber" plaintiffs' property. Plaintiffs argue that, under the rationale of *Rogers*, noncontracting spouses must consent not only to alienation or encumbrance of their property, but also to any improvements made to their property. They further argue that consent must also be obtained for agreements releasing claims arising out of such improvements. We reject this unsupported extension of *Rogers*.

Dennis argues that Sam had apparent authority to sign the release on Yazdan's behalf. Under principles of agency law, the actions of an agent bind a principal where the agent acts with either actual or apparent authority. Actual authority may be express or implied. Apparent authority may arise when a purported agent's acts and appearances lead a third person to reasonably believe that an agency relationship exists; however, this authority cannot be established only by the agent's acts but must be traceable to the principal. *Meretta v Peach*, 195 Mich App 695, 698-699; 491 NW2d 278 (1992).

According to 1 Restatement Agency, 2d, § 27, p 103, apparent authority is created "by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him." Regarding agency between spouses:

> Neither husband nor wife by virtue of the relation has power to act as agent for the other. The relation is of such a nature, however, that circumstances which in the case of strangers would not indicate the creation of authority or apparent authority may indicate it in the case of husband or wife. Thus, a husband habitually permitted by his wife to attend to some of her business matters may be found to have authority to transact all her business affairs. [*Id.*, § 22 comment b, p 94.]

In determining whether an agent had apparent authority to perform a particular act on behalf of a principal, a court must look at all the surrounding facts and circumstances. *Meretta, supra* at 699. If the circumstances show that the principal intended the agent to possess the authority to perform the act on the principal's behalf, then actual (rather than apparent) authority may be implied. *Hertz Corp v Volvo Truck Corp*, 210 Mich App 243, 246; 533 NW2d 15 (1995).

Here, the facts and circumstances indicate that Sam had apparent, if not actual, authority to sign the release on behalf of Yazdan. Sam negotiated the fountain contract with Dennis and signed the contract as the "Customer"; Yazdan did not participate in the negotiations or sign the contract. Yazdan never objected to the contract or to Dennis' performance of the work, even though she was home at least part of the time he was working. When water flooded plaintiffs' basement and Dennis helped Yazdan remove it, she did not raise any objections to his continuing the work. After the fountain was installed, Sam and Dennis repeatedly discussed the purported

damage and the issue of insurance; during this time Yazdan never repudiated her husband's actions or advised Dennis that her husband wasn't authorized to release any claims for damages. Significantly, plaintiffs do not contend that Sam in fact lacked apparent or even actual authority to act on Yazdan's behalf in signing the release.

Equity considerations further bind Yazdan to the provisions of the release. "Whenever a principal has placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in assuming that such agent is authorized to perform in behalf of the principal the particular act, and such particular act has been performed, the principal is estopped from denying the agent's authority to perform it." *Meretta*, *supra* at 699-700, quoting *Central Wholesale Co v Sefa*, 351 Mich 17, 26-27; 87 NW2d 94 (1957). Here, Dennis dealt only with Sam in negotiating and executing the fountain contract. Moreover, both Sam and Dennis believed the release would conclude the matter, which shows that Dennis believed Sam was authorized to act on Yazdan's behalf in signing it. Dennis clearly intended the release to prohibit all claims arising from the installation of the fountain; Sam agreed that after Dennis filed the insurance claim, "that's it, I'm done, we're done." We therefore agree with the trial court that it would not be "equitable or logical" to allow Yazdan to proceed with her claims.

We conclude that the trial court did not err in granting summary disposition to defendants on the ground that the agreement between the parties is a valid release supported by consideration that bars the claims of Yazdan as well as Sam.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood
/s/ Alton T. Davis